United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

75-1065

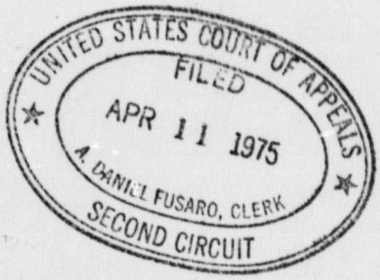
To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- FRANK WINGATE and KENNETH LUKE SMITH, Appellants.	Docket No. 75-1065

BRIEF FOR APPELLANT
FRANK WINGATE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the Government's introduction of two statements made by a non-testifying co-defendant incriminating appellant denied appellant his Sixth Amendment right to confrontation and requires reversal.

2. Whether the District Court's refusal to permit appellant to introduce at trial the transcript of Smith's prior testimony at the suppression hearing infringed upon appellant's right to present a defense, in violation of due process.

3. Whether the inflammatory misconduct of the prosecutor so prejudiced the jury's deliberations as to deny appellant his right to a fair trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel) entered February 18, 1975, after a trial before a jury, convicting appellant Frank Wingate and his co-defendant Kenneth Luke Smith of one count of conspiracy to possess and distribute heroin, in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A). Appellant Wingate was sentenced to a term of three years in prison, six months of which are to be served in a jail-type institution and the remainder of which is to be suspended, pursuant to 18 U.S.C. §3651, and then to a three-year period of probation following release. Appellant Wingate is currently released on bail pending appeal.

The District Court granted leave to appeal in forma pauperis, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Wingate and his co-defendant, Kenneth Smith, were charged in a three-count indictment* with conspiracy to distribute a narcotic drug controlled substance (Count One), and two attempts to possess and distribute heroin, the first on June 14, 1974 (Count Two), and the second on July 1, 1974 (Count Three). At the close of the Government's case, the trial judge entered a judgment of acquittal on Counts Two and Three, on the ground that the evidence was wholly insufficient to establish that appellant and Smith had actually attempted to sell heroin (210-211**).

Although no drugs were ever purchased or possessed, the Government's theory of this case was that Smith and appellant engaged in a conspiracy in which Smith was the source of the drugs and appellant was the negotiator and conduit from Smith to Marell Tyre, the informer. The defense theory was that appellant, although willing to try to get drugs in order to raise needed money, had nonetheless never conspired with Smith.

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*The indictment is "B" to appellant's separate appendix.

**Numerals in parentheses refer to pages of the transcript of the trial.

A. Pre-Trial Proceedings

Prior to trial a hearing was held on Kenneth Smith's motion to suppress a statement* he had made to Assistant United States Attorney Daniel Murphy. Murphy testified that on the morning of July 2, 1974 (S.17**) he interviewed Smith and took a question-and-answer statement (S.18-19). In pertinent part, the statement asserted:

> Q. O.K. You're charged with Frank Wingate of conspiring to sell heroin, do you understand that charge?
>
> A. Yes.
>
> Q. You told the agent you were going to get the heroin from Bumpy [sic], is that right?
>
> A. That's right.
>
> Q. How much heroin was it?
>
> A. Well, he didn't know exactly what it was, but he thought maybe it was an eighth.
>
> * * *
>
> Q. What was Frank Wingate supposed to do?
>
> A. He might of ...
>
> Q. He set it up, right, he set you up?
>
> A. Right.

Appendix D.

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*The statement is "D" to appellant's separate appendix.

**Numerals preceded by "S" in parentheses refer to pages of the transcript of the suppression hearing, dated December 27, 1974.

The Government agreed that the reference to the charge of conspiracy with appellant and the acknowledgment that appellant had "set up" the deal would be deleted.* However, it was also revealed at the hearing that Smith had made another statement** to the authorities. On the night of his arrest, Smith, according to Agent Gregory Korniloff, retracted his initial assertion that he didn't know why he was being arrested, and conceded that he had agreed to help appellant. According to Korniloff, Smith said that appellant had asked him to obtain some drugs. Smith agreed, intending to buy the drugs from a man named "Bumpsie," but he explained to appellant that he had to have the money before he could get the drugs. Solely for the purpose of getting the money, Smith and appellant drove to LaGuardia Airport to meet the supposed customer, a man named Marell Tyre (S.42).

Kenneth Smith testified on his own behalf.*** He explained that he had driven to the airport only at appellant's request, and merely to do him a favor without knowing its purpose (S.50). He also maintained that he had no intention of buying drugs from Bumpsie, or anyone else, and that his prior assertions that appellant had set up a drug deal were false (S.59-60).

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*The redacted confession is annexed as "D-1" to appellant's separate appendix.

**Counsel for Smith unsuccessfully objected to this testimony about another statement on the ground that the Government had failed to indicate prior to the hearing that it intended to introduce any statement other than the one Smith made to the Assistant United States Attorney.

***The transcript of Smith's testimony is "E" to appellant's separate appendix.

Smith explained he had lied about these two items during the questioning because he was suffering the pain of withdrawal from heroin, to which he was addicted (S.51). His physical discomfort caused him to say whatever he believed the agents wanted to hear. He reasoned that if he satisfied the agents with a particular version of the facts, even if untrue, they would release him sooner (S.56-57, 61, 74), and said he would have said whatever he had to in order to obtain his release.*

After testimony by Agent Edward Magnuson (S.82-94) and appellant (S.95-100) concerning their conflicting observations of Smith's physical condition at the time of his arrest and interrogation, Judge Frankel denied Smith's motion to suppress the statement (S.104).

Counsel for appellant then moved to sever appellant's trial from Smith's, on the ground that Smith's statement to Assistant United States Attorney Murphy implicated appellant, and would therefore deny appellant his Sixth Amendment right to confront and cross-examine a witness against him. Trial counsel argued that, in the context of the Government's case, Smith's statement, even as redacted, was incriminating to appellant and required severance (S.107-110). Based on a representation to counsel by the Assistant United States Attorney

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*Counsel for appellant, anticipating the necessity of obtaining Smith's testimony for appellant's defense, sought unsuccessfully to question Smith further about the truthfulness of his prior statements. Judge Frankel precluded this inquiry (S.79-80).

who prosecuted this case that the Government intended to offer only the statement made to Mr. Murphy, and not the oral statement made to Agent Korniloff, counsel's motion was directed to only the written statement (S.107). Considering only the statement to Assistant United States Attorney Murphy, Judge Frankel found that the redacted written statement was not incriminatory, and denied the motion for severance (S.119-126).

B. The Trial

The Government's case consisted of testimony concerning conversations and meetings about a proposed drug transaction, but, none of the discussion having reached fruition, no heroin was produced. It was the prosecution's theory of the case that Smith, pursuant to an agreement made with appellant, would supply the drugs to appellant, who had been the negotiator for the sale with Marell Tyre, the Government's informer.

The Government's evidence showed no connection between Smith and appellant until the automobile trip to LaGuardia Airport on July 1, 1974. Thus, according to the evidence, Marell Tyre, a convicted cocaine importer who admitted to a prior history of seven years of narcotics trafficking for which he would not be prosecuted (116),* telephoned appellant from Florida at

*Tyre admitted that he continued his private narcotics traffic while working for the Government, and had, in fact, secretly purchased drugs when he was brought to New York at government expense for the purpose of making a case against appellant (121-122). Tyre also admitted lying to government agents in Florida (96).

the behest of the Government to arrange a narcotics deal (70). Tyre pretended to have customers with substantial funds for the purchase of heroin, and asked if appellant could supply one-eighth kilogram of the drug. In response, appellant said he thought he could get the drugs, and agreed to check with his source and get back to Tyre (70-71). In mid-June, Tyre flew to New York, where he was met by some government agents, and was stationed at the Holiday Inn in Manhattan (71). From there he called appellant several times,* and the two finally agreed to meet on the afternoon of June 14, 1974, at the Crotona Bar in the Bronx (73-74). At this meeting, attended also by Officer Heyward posing as a purchaser, appellant asserted that he had arranged to buy the drugs, but that in order to get them from his "man," he had to have cash on delivery (74-75). After some argument, Heyward gave appellant $3,100,** one-half of the purchase price (35), and appellant left the bar, entered a green Oldsmobile occupied by an unidentified man and woman,*** and drove to Manhattan (75, 129-130). Shortly thereafter, he returned to the bar and gave back the money, explaining that he feared he was being watched by the police and thought it best not to complete the deal.

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*Tape recordings of these conversations were introduced into evidence.

**Tyre testified that he thought Heyward had given appellant $1,500 (75).

***The male driver of the car was not Kenneth Smith (63). The complaint filed against the driver and passenger of the green Oldsmobile has been dismissed.

The negotiations thwarted, Tyre left New York to return to Florida (77). Approximately two weeks later he said that appellant called him and asked him to come back to New York. Upon arriving at LaGuardia Airport late on the night of July 1, 1974, Tyre called appellant at the Crotona Bar and asked him to come to the airport. Reluctant to do so, appellant, according to Tyre, finally agreed, saying he would bring "his man" out to the airport with him (77-80).

Appellant arrived at the airport in a car driven by Kenneth Smith, who is mentioned in the testimony for the first time at this point. Appellant and Tyre talked alone outside the car, and appellant insisted that Tyre meet him later at the Crotona Bar. At one point, according to Tyre, appellant returned to the car and asked Smith to circle the terminal to check out a suspicious looking car (81-82). Shortly thereafter, as they started to drive away, appellant and Smith were placed under arrest (138). No drugs were found in their possession or in the car.

As the only direct evidence of what it considered to be the illegal agreement between Smith and appellant, the Government introduced Smith's two post-arrest statements. Govermnent Exhibit #3, the redacted question-and-answer statement, was read to the jury by the prosecutor, who revealed by way of introduction that matter had been deleted from the statement (143).* In

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*Counsel's objection resulted in the Court's rebuke to the prosecutor and a caution to refrain from imparting such information to the jurors.

the statement, Smith admitted he was going to buy heroin from a man named "Bumpsie" and that an unidentified "he" (presumably Smith's purchaser) said he wanted "an eighth" (142).

Then, despite a pre-trial representation by the Assistant United States Attorney that he would not use in evidence the oral statement Smith had made to Agent Korniloff, on direct examination by this same prosecutor Korniloff testified as follows:

> At that time Mr. Smith became anxious and stated that the vehicle [in which he had driven appellant to LaGuardia Airport] was owned by his girl friend and that he had hur[t] the woman so many times before and he couldn't hurt her this one more time.
>
> At that time he said that he had met an individual earlier that evening at the Crotona Bar and that this individual had asked him to obtain some heroin for him for a customer who he intended to later meet at LaGuardia Airport.
>
> Mr. Smith told this individual that he could obtain the heroin from a Mr. Bumpsie who lived on 223rd Street in Manhattan but that he would need the money for the drugs that same evening or before they could obtain the drugs.
>
> So they both got into Mr. Smith's vehicle and went to LaGuardia Airport to meet the individual and obtain the money.
>
> This didn't happen, of course, the individual did not have the money and thereby [sic] he couldn't obtain the drugs.
>
> (199).

At the close of the Government's case, on a motion made by defense counsel, the trial judge entered a judgment of acquittal on Counts Two and Three of the indictment, which charged attempted sales of heroin on June 14 and July 1, respectively

(210). The motion for acquittal on the conspiracy count was denied.

C. The Defense

Frank Wingate testified in his own defense. He conceded that when Tyre asked him to get drugs he had agreed to do so because, he explained, he was unemployed and desparately in need of funds. He maintained throughout that this was the first time he had become involved in a drug transaction and that he had never before obtained drugs for Tyre (225). Accordingly, his repeated assertions to Tyre that he could make the sale were really no more than puffery. In fact, as late as June 14 he didn't know whether he would be able to obtain the heroin Tyre wanted (227, 230).

Appellant denied that he ever agreed with Smith to sell drugs, and that even when he asked Smith to take him to the airport he did not reveal that the intended meeting was with a narcotics purchaser (244). Similarly, appellant explained that Jacob Edwards, the man driving the green Oldsmobile on June 14, was not appellant's narcotics source, but was merely a friend who had agreed to give appellant a ride downtown (232). In this regard, appellant expalined that his reference to both Smith and Edwards as "my man" was merely a colloquialism for "my friend" (236, 243).

According to appellant, his potential drug source was a

man named "Ray," who had indicated that he could supply drugs to appellant. However, appellant never saw the drugs, nor did he ever receive a sample. While he did not actually know whether "Ray" could supply the drugs, appellant hoped he could* (231, 246, 261). Appellant conceded that the reason he did not attempt to go through with the transaction was that he feared police surveillance (251).

Out of the presence of the jury, appellant called Kenneth Smith as a witness. Smith asserted his Fifth Amendment privilege and refused to testify (297-298). Defense counsel then requested that, in support of the defense theory that there was no concerted action between appellant and Smith, he be permitted to introduce the testimony given by Smith at the pretrial suppression hearing in which Smith stated that he and appellant had not been involved in a drug scheme (301). Counsel for Smith did not object to the introduction of this testimony (303), but the trial judge sustained the Government's objection and denied counsel's request (304).

In summation, the prosecutor argued that Smith was the man behind the scenes, the source of supply (370, 371, 372, 375-376). Referring to Smith's statement to Agent Korniloff, the prosecutor argued:

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*Appellant revealed that at one juncture "Ray" told him that he had the drugs available and was ready to sell (269-270).

> Back at headquarters [Smith] realized the situation he was in. He felt remorseful, perhaps, and gave a statement. He said he met someone in the Crotona Bar, agreed to give him a kilogram of heroin, which was precisely the deal going on here in court.
>
> The following day this was reduced to writing. You even have that. It is Government Exhibit 3 in evidence. We will give you a Xerox of that if you want to look at it because we blocked out certain matter you need not consider. But it is all there, and I read it to you before. I won't go into it in detail again, but it is the facts of this crime just as alleged in the indictment and just as you heard from Mr. Tyre was going to take place.
>
> (373).

Of the truthfulness of Smith's prior statements, the prosecutor said:

> I think if you see the statement that it was given freely and voluntarily, that it was completely accurate and truthful....
>
> You heard that he flipped the pages before signing it to make sure it was completely accurate. You know very well a person after having been advised of his rights on four occasions does not make a statement, a signed statement, to two United States Attorneys unless that statement is the truth.
>
> (374-375.

The prosecutor then cautioned the jurors that if they were to acquit appellant because he was poor, they would be giving license to all the poor people in the City of New York to break the law (376). He concluded by saying:

> Now, I have only one last word. The United States Congress has passed the narcotics laws and appropriated funds so they may be enforced and you have heard of many

> federal agents and state agents that have done their jobs and collected evidence on the violation of the narcotics laws. You heard about the use of Kel transmitters, you have seen tape recordings that were used.
>
> You have seen an undercover agent, a dedicated officer like Police Officer Heyward. You heard about the buy money that was advanced. These officers have gone out very carefully and done their job to enforce the narcotics laws and to protect you against the narcotics traffic.
>
> What remains is up to you. All of these laws mean absolutely nothing if this man can go free.
>
> (377-378).*

The Judge charged the jury.** During deliberations, the jury returned to ask for Smith's written statement to Murphy (409). After deliberations, the jury returned a verdict of guilty as to both appellant and Smith (409).

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*Defense counsel's objection was overruled.

**The charge is "C" to appellant's separate appendix.

ARGUMENT

Point I

THE GOVERNMENT'S INTRODUCTION OF TWO STATEMENTS MADE BY A NON-TESTIFYING CO-DEFENDANT INCRIMINATING APPELLANT DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AND REQUIRES REVERSAL.

In joint trials, like the one held in this case despite defense counsel's motion for a severance, the Government's use of statements by a non-testifying co-defendant is strictly limited. The statement cannot contain matter incriminatory to another defendant in the case, for to permit such hearsay allegations into evidence is to deny the silent defendant his Sixth Amendment right to confrontation. Bruton v. United States, 391 U.S. 123 (1968).

The opinion in Bruton makes clear that even if the name of the person referred to in the statement is omitted, if other evidence in the case identifies him as the un-named individual, the use of the statement is error. Mr. Justice White recognized that in order for a co-defendant's statement to be effectively redacted to comply with the mandate of Bruton, it must eliminate any references to a person who can otherwise be identified as the defendant:

> I would suppose that it will be necessary to exclude all extra-judicial confessions unless all portions of them that will implicate defendants other than the declarant are effectively deleted. Effective deletion will probably require not only omission of all direct and indirect inculpations of co-defendants, but also of any statement that could be employed against those defendants once their identity is otherwise established.
>
> Bruton v. United States, supra, 391 U.S. at 143 (dissenting opinion).

See also United States v. Glover, 506 F.2d 291, 298 (2d Cir. 1974); THE SUPREME COURT, 1967 TERM, 82 Harv.L.R. 63, 237-238 (1968).

Consequently, in United States v. Serio, 401 F.2d 989 (D.C. Cir. 1968), a Bruton violation was found where the substitution of the words "another man" were, from the other evidence in the case, ineffective to prevent the inevitable conclusion that Serio was the other man. See also United States ex rel. LaBelle v. Mancusi, 404 F.2d 690 (2d Cir. 1968). In accordance with this analysis, the decisions of this Court permit introduction of a co-defendant's statement only when all references to the non-declarant have been deleted (United States v. Trudo, 449 F.2d 649, 652 (2d Cir. 1971)), or when the redacted statements in no way incriminate him. United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1057 (2d Cir. 1970); Bailey v. United States, 410 F.2d 1209, 1213 (10th Cir. 1969); United States v. Lipowitz, 407 F.2d 597, 600 (3d Cir. 1969).

Even before Bruton v. United States, supra, this Court,

in an opinion by Judge Friendly in United States v. Bozza, 365 F.2d 206, 214-218 (2d Cir. 1966), found that a co-defendant's confession, redacted only insofar as it removed the names of other defendants, is nonetheless incriminatory to those defendants and violative of their right to confrontation if, in light of the other evidence in the case, the confession is attributable to them. Judge Friendly explained:

> ... It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind....
>
> Id., 365 F.2d at 215.

See also Jones v. United States, 342 F.2d 863 (D.C. Cir. en banc 1964); Greenwell v. United States, 336 F.2d 962, 969 (D.C. Cir. 1964); People v. Aranda, 407 P.2d 265, 277-273 (Cal. Sup. Ct. 1965) (Traymor, Ch.J.).

That is exactly the error which occurred in this case. The prosecution used two statements made by co-defendant Kenneth Smith which, despite redaction, improperly implicated appellant and denied him the right to confront a witness against him. In its direct case, the Government, through the testimony of Agent Korniloff, presented Smith's post-arrest statement as follows:

> [Smith] said that he had met an individual earlier that evening at the Crotona Bar and that this individual had asked him to

> obtain some heroin for him for a customer who he intended to later meet at LaGuardia Airport.
>
> Mr. Smith told this individual that he could obtain the heroin from a Mr. Bumpsie who lived on 223rd Street in Manhattan but that he would need the money for the drugs that same evening or before they could obtain the drugs.
>
> So they both got into Mr. Smith's vehicle and went to LaGuardia Airport to meet the individual and obtain the money.
>
> This didn't happen, of course, the individual did not have the money and thereby [sic] he couldn't obtain the drugs.
>
> (199).

This statement was unmistakably incriminating to appellant. The substitution of the words "an individual" in place of appellant's name was a lame and totally ineffective redaction. The testimony of Marell Tyre and the surveillance officers had established that appellant was the only other person in the car when it arrived at LaGuardia Airport. On this record, there was no way the jury would not conclude that appellant was the "individual" referred to in the statement.

According to the statement, appellant was working with Smith to get the heroin from Bumpsie. Further, the statement informed the jury that the purpose of both Smith and appellant in going to the airport was to get the advance payment for the drugs which Bumpsie required before he would deliver the heroin to them.

Similarly incriminating to appellant was Smith's question-

and-answer statement, introduced into evidence as Government Exhibit #3 and read to the jury by the prosecutor. In this statement, Smith again conceded that, with appellant, he intended to buy heroin from Bumpsie and that the "he" for whom he was buying the drugs thought he wanted about "an eighth." Although the statement was redacted so as to omit references to appellant by name, the prosecutor told the jury that portions of the statement had been deleted.*

The natural conclusion to be drawn from the fact that there is reference in the statement to an unidentified "he," and the knowledge that originally there had been other assertions in the statement is that these deletions implicated appellant.** In any event, even if there were a remote possibility that the jury would miss the significance of this second statement as it applied to appellant, the prosecutor remedied that situation by drawing all the necessary, but improper, connecting lines. In his summation, he reminded the jury that Smith had admitted to Agent Korniloff that he had agreed with "someone" at the Crotona Bar to supply a kilogram*** of heroin, which the prosecutor characterized as "precisely the deal going on here in court." He then went on to say that Government Exhibit

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*Counsel's objection resulted in a direction by the Court to refrain from imparting such information to the jury.

**The unidentified "he" was either appellant or Tyre who obviously had made the request through appellant.

***This misstatement of the amount is apparently the prosecutor's exaggeration.

3 was merely the written memorandum of that earlier statement Smith had made to Korniloff. Again, this time in direct contravention of a court order, the prosecutor told the jury that there were "certain matter blocked out of the statement" but that nonetheless "it was all there ... the facts of the crime just as alleged in the indictment and just as you heard from Mr. Tyre."*

In this context, juxtaposing the fact that there were deletions in the written statement -- a fact unnecessarily emphasized when the jury saw the obvious blank spaces in Exhibit #3 which they requested during deliberations -- and the assurance that Exhibit #3 was the reduction to writing of the prior oral statement, the certain speculation was that the deletions were Smith's explicit admissions that he and appellant conspired to provide Tyre with heroin.

Trial counsel, recognizing the necessary incrimination of appellant by Smith's statements, moved prior to trial for a severance. However, counsel was precluded from making his motion on an accurate analysis of the Government's case because the prior representations of the prosecutor misled counsel to believe that the Government would introduce only the written statements of Smith (S.107). Therefore, counsel argued only that the written statement, in the context of the Government's other evidence, was incriminating to appellant.

*Not only were the statements on their face incriminating to appellant, but the prosecutor presented them without pretense of limiting their application to a determination of Smith's guilt.

Unconscionably, the prosecutor never sought to disabuse trial counsel, and subsequently Judge Frankel, of their "misapprehension" of the Government's intention. In fact, the prosecutor's arguments on the motion addressed only the potential prejudice of the written statement so as actively to perpetuate this misconception. In so doing, the prosecutor violated his duty to inform the Court and counsel, prior to trial, of his anticipated use of a co-defendant's statement. United States v. Glover, supra, 506 F.2d at 298. This misfeasance resulted in a denial of the motion to sever based on incorrect factual assumptions,* and the subsequent improper introduction of evidence highly prejudicial to appellant.

The only charge submitted to the jury was that of a conspiracy between Smith and appellant to distribute and possess heroin. On the issue of whether there was any agreement between Smith and appellant, the Government's direct evidence was only the two statements made by Smith.** Without the oral statement and the corroboration provided in Smith's written statement,

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*Appellant maintains that the decision was incorrect even when based on the facts then before Judge Frankel.

**The impact of the statements must of course be assessed in terms of evidence presented in the Government's case. The harm is not mitigated by appellant's subsequent decision to testify, since that decision was predicated on the need to defend against the damage already caused by the introduction of the statements. United States v. Lyon, 397 F.2d 505 (7th Cir. 1968); see also Harrison v. United States, 392 U.S. 219 (1968); United States ex rel. O'Connor v. New Jersey, 405 F.2d 632, 638 n.20 (3d Cir.), cert. denied sub nom. Yeager v. O'Connor, 395 U.S. 923 (1969); cf., United States v. Camporeale, Doc. No. 74-2603 (2d Cir., April 4, 1975).

the Government's proof was only that Smith had driven appellant to the airport and that appellant had earlier referred to Smith, as he had similarly referred to other friends, as "my man."* This evidence, standing alone, is clearly insufficient to establish that a conspiracy existed between appellant and Smith. United States v. Raymond Johnson, Doc. No. 74-2437 (2d Cir., April 1, 1975).

The other evidence, Marell Tyre's testimony and the tapes of the conversations between appellant and Tyre, establish only that appellant said he had a source of supply for the heroin Tyre requested. Tyre's testimony did not show who that source was, or in fact that there really was a source, since no heroin was ever produced and there was no proof that appellant ever possessed the drugs, that the drugs referred to existed, or that they were available to appellant. Had the Government thus failed to convince the jury of the Smith-Wingate conspiracy, there remained the likely possibility that the jury would acquit, finding appellant a reprehensible hustler but not a conspirator.

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*The "my man" reference is easily susceptible to innocent interpretation.

Point II

THE DISTRICT COURT'S REFUSAL TO PERMIT APPELLANT TO INTRODUCE AT TRIAL THE TRANSCRIPT OF SMITH'S PRIOR TESTIMONY AT THE SUPPRESSION HEARING INFRINGED UPON APPELLANT'S RICHT TO PRESENT A DEFENSE, IN VIOLATION OF DUE PROCESS.

Appellant testified, in direct conflict with the Government's theory of the case and the evidence presented by the prosecution, that he never conspired with his co-defendant, Ken Smith, to provide heroin to Marell Tyre. Appellant explained that Smith was merely an acquaintance who was at the Crotona Bar on July 1, 1974, and who reluctantly agreed to drive appellant to the airport when Tyre insisted in a telephone call that appellant meet him there. Appellant never informed Smith of his purpose in going to the airport, and Smith's actions on the night of July 1 were only those of an innocent chauffeur.

Appellant further explained that his assertions to Tyre that he could supply heroin were, despite his best efforts, mere puffery. He described his various attempts to obtain the drugs, but maintained, and the evidence supported this contention, that he never succeeded. According to appellant, despite his boasts to Tyre, he was never certain he could produce the heroin Tyre wanted.

Clearly, it was pivotal to this defense to counter the Government's central argument that regardless of the failure

to produce tangible results appellant had nonetheless conspired with Smith to provide heroin.* To that end, appellant sought to use Smith's suppression hearing testimony to establish that they had not agreed to sell heroin.

At the pre-trial suppression hearing, Smith had testified that, solely as a favor to appellant, he had driven him to the airport, but that he was never informed, nor did he know, that appellant was going there in the hope of negotiating a drug sale. Further, Smith asserted that his prior statements admitting participation with appellant in the potential drug transaction were false. Smith explained that at the time he was questioned by the agents he was suffering from the pain of withdrawal from heroin and that he was willing to tell the officers whatever he believed they wanted to hear. In his physical desparation, he reasoned that if he satisfied the authorities with a particular version of the facts, even if untrue, they would release him sooner. This logic, according to Smith, inspired him to implicate appellant and to confess to a crime he had not, in fact, committed.

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*While the conspiracy charged included an allegation of conspiracy with unknown individuals, the entire thrust of the Government's case was that appellant had entered into a conspiracy with Smith, and the jury's verdict against both Smith and appellant indicates that the jurors accepted this version of the facts rather than any theory based on a conspiracy between appellant and "Ray."

This testimony was particularly critical in light of the Government's use in its direct case of Smith's two prior statements which conceded an agreement with appellant. In commenting on these statements in his summation, the prosecutor had vouched for their truthfulness, saying:

> I think if you see the statement that it was given freely and voluntarily, that it was completely accurate and truthful....
>
> You heard that he flipped the pages before signing it to make sure it was completely accurate. You know very well a person after having been advised of his rights on four occasions does not make a statement, a signed statement, to two United States Attorneys unless that statement is the truth.
>
> (374-375).

In this context it was essential that appellant be permitted to show the jury that Smith, under oath, had repudiated his prior statements. However, he was improperly precluded from doing this.

Because Smith exercised his Fifth Amendment privilege not to testify,* he was an unavailable witness for appellant's defense. United States v. Mobley, 421 F.2d 345, 351 (5th Cir. 1970); see also Federal Rules of Evidence, Rule 804(a)(1) (effective July 1, 1975). Therefore, upon a showing that Smith's prior testimony bore sufficient "indicia of reliability," appellant was entitled, since Smith did not object, to introduce

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*Out of the presence of the jury appellant's trial counsel tested that assertion and sought unsuccessfully to call Smith as a witness. See United States v. Sanchez, 459 F.2d 100 (2d Cir.), cert. denied, 409 U.S. 864 (1972).

that testimony.* Chambers v. Mississippi, 410 U.S. 284, 298-302 (1973); Federal Rules of Evidence, Rule 804(b)(1) (effective July 1, 1975).

Smith's prior testimony was virtually imbued with the requisite indicia of reliability. Dutton v. Evans, 400 U.S. 74 89 (1970). First, it was testimony, under oath, before -- as Smith then knew -- the same judge who was to preside at the trial and might ultimately sentence him. Not only was Smith therefore subject to a perjury indictment if he lied, but he was also subject to an increased sentence on the drug charge if Judge Frankel believed he had lied on the witness stand. United States v. Hendricks, 505 F.2d 1233 (2d Cir. 1974) (Frankel, J.**).

Second, the truthfulness of the testimony was subject to cross-examination by the Government. The prosecutor's complaint that he had not cross-examined Smith sufficiently is simply beside the point. Wigmore provides that the opportunity for cross-examination is the full equivalent (within the hearsay context) of actual cross examination:

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*It must be noted in this regard that since the Government does not have a Sixth Amendment right to confrontation, appellant is not faced with the usual, but nonetheless surmountable, constitutional barrier to use of prior testimony. Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970).

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> Opportunity of Cross-examination, as equivalent to Actual Cross-examination. The principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an opportunity to exercise the right to cross-examine if desired.
>
> The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. This doctrine is perfectly settled.
>
> Wigmore, ON EVIDENCE, §1371. Emphasis in the original; footnote omitted.

When Smith testified exhonerating appellant, the prosecutor was on notice that this testimony was relevant to the defense.* Moreover, not only did the Government have ample opportunity for cross-examination,** the Assistant United States Attorney did, in fact, cross-examine Smith in sixteen pages of tran-

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*In fact, trial counsel stated as much on the record (S.79).

**The Supreme Court has indicated that opportunity for cross-examination will satisfy even the confrontation clause. In Barber v. Page, 390 U.S. 719, 726 (1968), the Court held:

> While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

See also Pointer v. Texas, 380 U.S. 400, 407 (1965).

script about the veracity of both his present assertions of innocence and his contention that withdrawal from heroin, to which he was addicted, inspired his previous lies to the agents (S.67-71).**

Third, admitting that his statements made to the agents and to Assistant United States Attorney Murphy were false, Smith was making a statement that subjected him to possible penal liability. 18 U.S.C. §1001 sanctions false statements to government officers. Statements against penal interest are clearly an added index of reliability. Chambers v. Mississippi, supra, 410 U.S. at 298-300; Dutton v. Evans, supra, 400 U.S. at 89.

Finally, that Smith's testimony was worthy of belief is established by the fact that despite the prosecutor's incredulity, Smith is a drug addict. At sentence, it was revealed that Smith had left his job with the Department of Social Services in order to enter a full-time drug program (447). Significantly, at the time of sentence, Judge Frankel specifically rejected the Government's theory, establishing through Smith's prior statements that Smith was appellant's source for drugs (454). Surely appellant was entitled to have the jury see Smith's testimony so that it, too, might have rejected the Government's theory.

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*Smith's entire testimony, including cross-examination, is annexed as "E" to appellant's separate appendix.

On these facts, the District Court's refusal to permit appellant to introduce Smith's prior testimony was violative of due process in that it critically infringed on appellant's right to present a witness in his defense. Chambers v. Mississippi, supra, 410 U.S. at 302; Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14, 19 (1967); In re Oliver, 333 U.S. 251, 273 (1948). The conviction must be reversed.

Point III

THE INFLAMMATORY MISCONDUCT OF THE PROSECUTOR IN THIS CASE SO PREJUDICED THE JURY'S DELIBERATIONS THAT IT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

In addition to his misfeasance in the introduction into evidence of Smith's post-arrest statements (the failure to inform the trial judge and counsel of the Government's intention to introduce the oral statement, as well as the remarks to the jury designed to encourage improper use of the statement against appellant*) and his use of the prestige of his office to vouch for the truthfulness of these statements** (Berger v. United States, 295 U.S. 78 (1935); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960)), the prosecutor also resorted to inflammatory comments intended to inflame the prejudices of the jury. He cautioned the jurors that if they were to acquit appellant because

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*Supra, at 19-21.

** I think if you see the statement that it was given freely and voluntarily, that it was completely accurate and truthful....

You heard that he flipped the pages before signing it to make sure it was completely accurate. You know very well a person after having been advised of his rights on four occasions does not make a statement, a signed statement, to two United States Attorneys unless that statement is the truth.

(374-375).

See supra, at 25.

he was poor, they would be giving license to all the poor people in New York City to break the law. Over defense counsel's objection, he concluded by saying:

> Now, I have only one last word. The United States Congress has passed the narcotics laws and appropriated funds so they may be enforced and you have heard of many federal agents and state agents that have done their jobs and collected evidence on the violation of the narcotics laws. You heard about the use of Kel transmitters, you have seen tape recordings that were used.
>
> You have seen an undercover agent, a dedicated officer like Police Officer Heyward. You heard about the buy money that was advanced. These officers have gone out very carefully and done their job to enforce the narcotics laws and to protect you against the narcotics traffic.
>
> What remains is up to you. All of these laws mean absolutely nothing if this man can go free.
>
> (377-378).

Consequently, the jury was instructed by the Assistant United States Attorney, and never disabused of this belif by the District Court, that should they find appellant "not guilty" they would be, by their actions, thwarting the efforts of Congress and dedicated work by the police, and engendering a crime wave of city-wide proportions. Such inflammatory remarks by the prosecutor constitute reversible error. United States v. Viereck, 318 U.S. 236 (1943); United States v. Fulmer, 457 F.2d 447, 449 (7th Cir. 1972); United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969); Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966); United States v. Burgos, 304 F.2d 177 (2d Cir. 1972);

Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960).

In Brown v. United States, supra, the prosecutor employed tactics very similar to those used here and told the jury that to acquit the defendant would leave the police powerless to protect society short of resorting to martial law. This statement alone required reversal, and the Court, citing Berger v. United States, supra, 295 U.S. at 88, said of the conduct applicable here:

> Although the prosecutor may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> Brown v. United States, supra, 370 F.2d at 246.

CONCLUSION

For the above-stated reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted,

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April 11, 1975

Certificate of Service

April 11, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheila Ginsberg